IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 90-1742 and 90-1764
ARTIST M., *et al.*,
Plaintiffs-Appellees,
v.
GORDON JOHNSON and
GARY T. MORGAN,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 10503—Milton I. Shadur, *Judge.*

ARGUED JUNE 20, 1990—DECIDED OCTOBER 29, 1990

Before CUMMINGS and MANION, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

CUMMINGS, *Circuit Judge.* The plaintiffs in this class action suit allege that the Department of Children and Family Services (the "DCFS"), an agency of the State of Illinois, fails to assign caseworkers to members of their class in a timely manner and that this violates the federal Adoption Assistance and Child Welfare Act of 1980 (the "AAA").[1] Defendants Gordon Johnson and Gary Morgan are director and guardianship administrator, respectively, of the DCFS. They appeal from the entry of a preliminary injunction and enforcement order requiring them to adhere to the AAA's minimum requirements in several specific respects, and from the denial of their motion to dismiss the complaint.[2] We affirm.

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[1] The AAA is incorporated in Title IV, Parts B and E, of the Social Security Act. 42 U.S.C. §§ 620-628, 670-679(a).

[2] Allegations of violations of the federal Constitution are no longer part of this case. The district court granted defendants' motion to dismiss plaintiffs' due process claim and there has been no cross-appeal. See n.5 *infra.*

I. Procedural Background

The DCFS[3] and the State's Attorney's Office screen reports of abused, neglected, or dependent children and, on the basis of some of those investigations, the DCFS files petitions in the Juvenile Division of the Circuit Court of Cook County, Illinois ("Juvenile Court"). Following Juvenile Court hearings, some of the subjects of those petitions become wards of the Juvenile Court under the supervision of the DCFS. In some cases the Juvenile Court will award temporary custody of the child to the DCFS as custodian and in others the child will be returned to the custody of his or her parents under protective order.

Plaintiffs, wards of the Juvenile Court, filed this class action in December 1988 for alleged violations of the AAA by the DCFS. The class and a subclass were certified pursuant to Fed. R. Civ. Pro. 23(c)(1) shortly after suit was filed. Class A is composed of all children who are or will be subjects of Juvenile Court petitions, who are or will be in the custody of DCFS (or in a home under DCFS supervision) by an order of the Juvenile Court, and who are or will be without a DCFS caseworker for a significant period of time. Class B, the subclass, is identical to Class A except that Class B does not include children who are in a home under DCFS supervision by order of the Juvenile Court.

Plaintiffs allege that the DCFS violates the rights of class members by failing promptly to assign caseworkers to children under protective or supervisory court orders and also by failing promptly to reassign cases when a caseworker goes on leave, is terminated, or resigns. *Artist M. v. Johnson,* 726 F. Supp. 690, 692 (N.D. Ill. 1989). These alleged policies and practices of the DCFS

[3] For convenience, we follow the district court's latest memorandum opinion in referring to the defendants collectively as the DCFS. A state official sued for injunctive relief in his or her official capacity is a "person" for the purposes of a Section 1983 action, and therefore the plaintiffs' suit is not barred by the Eleventh Amendment. *Will v. Michigan Dep't of State Police,* 109 S. Ct. 2304, 2311 n.10.

purportedly violate Sections 671(a)(9), (a)(15), and (a)(16) of the AAA.[4] The plaintiffs assert that failure to assign caseworkers or to ensure that caseworkers hand off cases to each other promptly contributes to unnecessary abuse, neglect, and disintegration of families. Cast in terms of the AAA's requirements, the plaintiffs specifically allege that the DCFS fails to: (1) make "reasonable efforts" to prevent the removal of children from their homes, (2) make "reasonable efforts" to reunify with their families those children who have been removed from their homes, (3) notify appropriate agencies when a child is mistreated while placed in another home, and (4) develop case plans to assure proper services are provided to children while in placement. *Artist M.*, 726 F. Supp. at 696 n.8.

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[4] Section 671 states in relevant part (with emphasis supplied for a phrase that has become a focus of this case):

§ 671. State plan for foster care and adoption assistance

(a) Requisite features of State plan

In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—

* * *

(9) provides that where any agency of the State has reason to believe that the home or institution in which a child resides whose care is being paid for in whole or in part with funds provided under this part or part B of this subchapter is unsuitable for the child because of the neglect, abuse, or exploitation of such child, it shall bring such condition to the attention of the appropriate court or law enforcement agency;

* * *

(15) effective October 1, 1983, provides that, in each case, *reasonable efforts* will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return home;

(16) provides for the development of a case plan (as defined in section 675(1) of this title) for each child receiving foster care maintenance payments under the State plan and provides for a case review system which meet [sic] the requirements described in section 675(5)(B) of this title with respect to each such child; * * *.

Plaintiffs sued the DCFS under 42 U.S.C. § 1983, under the AAA directly, and under the Due Process Clause of the Fourteenth Amendment.[5] Defendants moved under Fed. R. Civ. Pro. 12(b)(6) for dismissal for failure to state a claim upon which relief could be granted. On November 21, 1989, Judge Shadur dismissed Class B plaintiffs' due process claim but denied the motion in all other respects, holding that plaintiffs could maintain a cause of action under Section 1983 as well as directly under the AAA. *Artist M.*, 726 F. Supp. at 696-697.

Thereafter the district court held a hearing with respect to the plaintiffs' request for injunctive relief. On March 2, 1990, the district court entered a preliminary injunction enjoining the DCFS from failing to assign a caseworker to plaintiffs within three working days of the time the case is first heard in Juvenile Court and from failing to reassign a caseworker within three working days after a previously assigned caseworker relinquishes any portion of the case. On April 3, 1990, the court amended the injunction by entering an order designed to monitor DCFS compliance with its terms.[6] The DCFS filed timely notices of appeal seeking review of the injunctive orders dated March 2 and April

[5] Although the district court found that in some circumstances Class B plaintiffs might properly maintain a due process clause action against defendants, it dismissed this claim because those plaintiffs failed to allege complete indifference on the part of defendants. *Artist M.*, 726 F. Supp. at 700. This portion of the November 1989 order is not before this Court. The district court observed that if Class A plaintiffs had asserted due process claims, they would have been barred by *De Shaney v. Winnebago Co. Dep't of Social Servs.*, 489 U.S. 189 (state's failure to protect child from father's abuse did not violate child's substantive due process rights). *Artist M.*, 726 F. Supp. at 699 n.14.

[6] The April 3, 1990, order established a weekly reporting mechanism for compliance with the March 2, 1990, preliminary injunction. Every Friday, the DCFS must provide the Office of the Public Guardian (counsel for plaintiffs) with a list of all of the class members whose cases have just entered Juvenile Court or who have recently lost their caseworker, along with the names of involved caseworkers and relevant dates of commencement or completion of assignments.

3, 1990,[7] as well as the November 21, 1989, order disposing of the DCFS motion to dismiss.

After hearing oral argument, this Court entered an order on June 21, modified on June 27, partially remanding this cause to the district court. The district court was to make factual findings regarding the nature of delays in caseworker assignments and the progress of DCFS reforms as they existed at the time the district court issued its March 2, 1990, injunction order. In light of the fact that the DCFS had voluntarily instituted a Reorganization Plan that could have affected the concerns addressed by plaintiffs, the district court was requested to make findings with respect to the extent of delay in caseworker assignment and reassignment at the time the injunction order issued.

After receiving submissions on these questions from the parties, the district court issued its memorandum opinion and findings on July 25, 1990. It is evident that the findings reflect the status of relevant DCFS activities at the time the injunction order issued because by agreement of the parties, the February 1990 logs of the DCFS regarding caseworker assignment were made an exhibit to a stipulated submission to the district court and the January and February activities of the DCFS were closely scrutinized by the district court.

The findings strongly support the district court's decision to issue an injunction. We will not attempt here to summarize these detailed findings, which are heavily cited to specific sources in the record. The district court reached the following conclusions: (1) the DCFS failed to show that its Reorganization Plan, begun

[7] The parties dispute the appealability of the April 3, 1990, order in which Judge Shadur modified the terms of the preliminary injunction entered March 2, 1990. The order of April 3 provided the district court with a mechanism to monitor defendants' compliance with the substantive portions of the injunction. This order is appealable pursuant to 28 U.S.C. § 1292(a)(1) as an order modifying the terms of an injunction. Accordingly, this Court has jurisdiction to review the terms of that order.

during the summer of 1988 and purportedly completed by July 16, 1989, moved the agency closer to the "reasonable efforts" required by the AAA[8]; (2) the DCFS demonstrated "a total lack of credibility" by pledging to make such changes and then failing to take effective steps to fulfill that pledge.[9]

II. The Adoption Assistance and Child Welfare Act of 1980

In 1980 Congress enacted the AAA as an amendment to the Social Security Act. 42 U.S.C. §§ 620-628, 670-679(a). It was in part an effort to "lessen the emphasis on foster care placement and * * * encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes." S. Rep. No. 96-336, reprinted in 1980 U.S. Code Cong. & Admin. News 1448, 1450 (96th Cong., 2d sess.). It sought to achieve those goals by providing states with "incentives to encourage a more active and systematic monitoring of children in the foster care system." *Vermont Dep't of Social and Rehab. Servs. v. United States Dep't of Health and Human Servs.*, 798 F.2d 57, 59 (2d Cir. 1986), certiorari denied, 479 U.S. 1064. These goals are particularly evident in the requirement discussed below that states must make "reasonable efforts" to prevent the need for removal of children from their homes and to make it possible for children who have been taken from their homes to return to their homes. 42 U.S.C. § 671(a)(15).

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[8] Findings bearing on this point are Numbers 21-37. For example, the total number of unassigned cases jumped from 232 on June 30, 1989, to 404 by year's end and the number of cases unassigned for over 30 days doubled over the same period of time. Finding 36.

[9] Findings bearing on this point are found at p. 3 n.5 and p. 15 n.10 of the court's memorandum, as well as in Findings Numbers 28-37. To cite only one example, the two officials to whom DCFS entrusted oversight of one aspect of its alleged remedies reviewed the program only two times during 1989. Finding 29.

The provisions of the AAA are codified in two separate parts of Title IV of the Social Security Act. Title IV-B provides funds to the states for the improvement of child welfare services. 42 U.S.C. §§ 620-628. Title IV-E provides reimbursement to the states for foster care maintenance and adoption assistance payments made by the states on behalf of eligible children. 42 U.S.C. §§ 670-679(a). Federal funding is provided under the Title IV-B program for child welfare services "which are directed toward the accomplishment" of a list of enumerated purposes, which include the following: "preventing the unnecessary separation of children from their families by identifying family problems, assisting families in resolving their problems, and preventing breakup of the family where the prevention of child removal is desirable and possible"; "restoring to their families children who have been removed, by the provision of services to the child and the families"; and "assuring adequate care of children away from their homes, in cases where the child cannot be returned home or cannot be placed for adoption." 42 U.S.C. § 625(a)(1)(C), (D), (F).

Section 622 of Title IV-B sets forth various features state plans must possess in order to be eligible for payments for these child welfare services. Additional funds may be allocated to a state that, among other conditions irrelevant for purposes of this appeal, implements a "case review system" for each child receiving foster care under the supervision of the State and a "service program." Service programs are to help children, where appropriate, return to families from which they have been removed or be placed for adoption or legal guardianship. 42 U.S.C. § 627(a)(2)(B), (C).[10] Failure of a state to maintain a plan in

[10] See also the examples listed by the Secretary of Health and Human Services as steps that may be taken toward compliance with Sections 627(a)(2)(C) and 427(b)(3). 45 C.F.R. § 1357.15(e)(2) (1989) (listing such measures as crisis counseling, drug and alcohol abuse counseling, and provision of temporary child care as potential elements in programs to permanently place children, if possible back with their own families).

compliance with any requirement established in Section 627 may result in the termination or reduction of funds. 42 U.S.C. § 627(b).

Turning to Title IV-E, Section 671 lists explicit requirements, strikingly similar to those found in 42 U.S.C. § 627(a)(2)(B) and (C) outlined above, with which the state must comply in order to be eligible for funding. 42 U.S.C. § 671(a)(16). As set out in footnote 4 of this opinion, Section 671(a)(15) mandates that the state plan must provide "that, in each case, reasonable efforts will be made * * * to prevent or eliminate the need for removal of the child from his home, and * * * to make it possible for the child to return to his home." Likewise, Section 671(a)(16) requires that the plan provide for the development of a "case plan" and "case review system," the elements of which are given in Section 675(1) and Section 675(5)(B), respectively. A case plan, for example, is defined as a written document that among other things includes a plan for assuring that services are provided to facilitate the return of the child to his own home or the permanent placement of the child. 42 U.S.C. § 675(1)(B). The final provision relevant to this appeal, Section 671(a)(9), requires that the plan provide for the reporting of unsuitable living conditions to law enforcement officials.

III. The November 1989 Order

Although the November 21, 1989, order denying the bulk of the DCFS motion to dismiss is not immediately appealable by itself, this Court may review that order in connection with the injunction if the injunction turns on the validity of that order, *Elliott v. Hinds,* 786 F.2d 298, 301 (7th Cir. 1986), or if the dismissal order is so entwined with the injunction order that judicial economy compels review. *Asset Allocation & Mgt. Co. v. Western Employers Ins. Co.,* 892 F.2d 566, 568-569 (7th Cir. 1989); *Parks v. Pavkovic,* 753 F.2d 1397, 1402 (7th Cir. 1985),

certiorari denied, 473 U.S. 906, 474 U.S. 918-919. Because evaluation of the likelihood of success turns as an initial matter on whether plaintiffs may maintain a cause of action against the DCFS under 42 U.S.C. § 1983 or directly under the AAA, the Court will reach the merits of the November order, which addressed those issues. We employ a *de novo* standard in reviewing these legal determinations. Because each of the lower court's legal conclusions regarding Section 1983 and an implied private right of action under the AAA requires a slightly different inquiry, they will be addressed separately. See *Boatowners and Tenants Ass'n, Inc. v. Port of Seattle,* 716 F.2d 669, 674 (9th Cir. 1983).

A. *Section 1983 Action*

Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. A plaintiff may pursue a cause of action under Section 1983 for violations of a federal statute. *Maine v. Thiboutot,* 448 U.S. 1, 4 (violations of Social Security Act enforceable under the "and laws" provision of Section 1983). Yet the Supreme Court recently reiterated that no action will lie if the statute does not create enforceable "rights, privileges or immunities" within the meaning of Section 1983 or if Congress foreclosed this avenue of relief in the enactment itself. *Wilder v. Virginia Hospital Ass'n,* 110 S. Ct. 2510, 2517. Though plaintiffs must point to a substantive provision that gives them a tangible right, privilege, or immunity, the burden is on the defendants to demonstrate that Congress intended to foreclose private enforcement of a right that is otherwise evident. *Wright v. City of Roanoke Redevelopment and Housing Auth.,* 479 U.S. 418, 423-424 (" 'We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy' for the deprivation of a federally secured right") (quoting *Smith v. Robinson,* 468 U.S. 992, 1012).

1. Existence of an Enforceable Right.—A statute will not be found to have created an enforceable right unless the provision in question is intended to benefit the plaintiff, the provision imposes a binding obligation on the state, and the right is not so amorphous that courts are unable to adequately enforce it. *Wilder,* 110 S. Ct. at 2517. The majority held in *Wilder* that an amendment to the Medicaid Act providing for "reasonable and adequate" reimbursement rates for health care providers creates an enforceable right under Section 1983. The Court found that the amendment was intended to benefit the health care providers, represented a binding obligation on the state of Virginia, and was not relied upon by the health care providers to pursue overly vague or amorphous interests. *Wilder,* 110 S. Ct. at 2517-2523.

The DCFS asserts that the "reasonable efforts" clause of Section 671(a)(15) fails in each of these respects and that therefore the clause does not provide plaintiffs with a right enforceable under Section 1983. That Congress enacted the AAA to benefit children such as those in the plaintiff classes cannot be seriously disputed. The Act's stated purposes are to strengthen assistance for needy children, improve welfare services, and aid families with dependent children. Both classes of plaintiffs consist of children who receive services pursuant to plans implemented by the state in accordance with the AAA and who, aside from parents, are the only direct beneficiaries of the Act's provisions.

In determining whether a federal enactment imposes a binding obligation on a state, courts look to "the context of the entire statute and its legislative history" for such congressional intent. *Wilder,* 110 S. Ct. at 2518; *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 13. The provisions sought to be enforced here are located in the Section setting forth in mandatory language the features a state plan must possess before funding will be provided. §§ 671(a)(9), (a)(15), (a)(16). When the right asserted is tied explicitly to the funding provision, the Supreme Court has found the requisite congressional intent. *Wilder,* 110

S. Ct. at 2519-2520 (funding conditioned on state setting reasonable and adequate rates created enforceable right under the Boren Amendment); *Wright,* 479 U.S. at 424 (regulation requiring reasonable allowance for utilities as condition for receiving federal funds created enforceable right under Brooke Amendment); but see *Pennhurst,* 451 U.S. at 13 (right to be placed in least restrictive environment did not create enforceable right under Developmentally Disabled Assistance and Bill of Rights Act of 1975, in part because right not tied explicitly to funding provision). Because the rights asserted here are tied indisputably to the funding provision the case is readily distinguishable from *Pennhurst* and, consequently, the AAA obligations are binding on the state.

Finally, this Court must determine whether the asserted rights are sufficiently explicit that the pertinent clauses are judicially enforceable. *Wilder,* 110 S. Ct. at 2517. The district court rejected the DCFS challenge on this ground based on the fact that courts routinely enforce contractual clauses which mandate that the parties exert "best" or "reasonable" efforts in complying with the terms of the contract. *Artist M.,* 726 F. Supp. at 695 n.6. In *Wilder,* the Supreme Court stated that simply because a provision gives the state great latitude in promulgating a "reasonable and adequate" rate does not render the provision unenforceable for vagueness. Instead, once the state exercises its discretion to select a method of calculating rates a court is still capable of determining whether the rate itself is reasonable in light of the method chosen. *Wilder,* 110 S. Ct. at 2522-2523. This same reasoning is applicable here. The Act requires that the state implement a plan that provides for reasonable efforts directed at preventing the removal of a child from home or, if the child is removed, to return the child to his family. 42 U.S.C. § 671(a)(15). The DCFS chose to use caseworkers as the means through which these services are provided. The DCFS concedes that although a caseworker does not herself provide services, caseworkers are necessary to arrange for the provision of services by others (Plaintiffs' Br. at 18). The

caseworker is a "lifeline." When the caseworker is absent, no efforts can be exerted for preventive and reunification services. See District Court's July 25, 1990, Findings, Findings 4-12.

Just as the Supreme Court in *Wilder* acknowledged that the State of Virginia had substantial discretion to choose the method it would use in calculating reimbursement to health care providers, so the DCFS has substantial discretion in choosing the method it will use to implement the requirements of the AAA. The judiciary is nevertheless capable of determining whether the state is exerting "reasonable efforts" to provide those services. The DCFS therefore cannot maintain that even if Section 671(a)(15) gives rise to an enforceable right, that right cannot be said to encompass a right to expeditious caseworker assignments. Instead, a court may evaluate the reasonableness of the efforts to secure those services by looking to the caseworker assignment process. As discussed in more detail below in Section IV, based on the district court's factual determination that DCFS fails to exert reasonable efforts to provide services mandated by the Act, the district court could order the remedy found in the preliminary injunction, namely expeditious assignment of caseworkers, to remedy that deficiency.

The district court rejected a request from the plaintiffs for a more stringent remedy, which called for the mandatory assignment of a caseworker to each of the plaintiffs and their families within 24 hours after the Juvenile Court places them in the temporary custody of the DCFS or returns them home under the supervision of the DCFS. The district court has also not attempted to fashion a remedy that interferes with the daily operations of the DCFS. Compare *L.J. ex rel. Darr v. Massinga,* 838 F.2d 118, 119-120 (4th Cir. 1988) (affirming broad interim and permanent injunctive relief, including expansion of medical relief to children), certiorari denied, 109 S. Ct. 816; see also *B.H. v. Johnson,* 715 F. Supp. 1387, 1402 (N.D. Ill. 1989) (plaintiffs requesting on the basis of AAA standards "sweeping duties" such

as an adequate number of caseworkers, family reunification services, services to "troubled families," or rights of meaningful visitation between siblings). It is important to note that the three-day requirement fits the estimate given by the DCFS itself of how quickly it would assign caseworkers under its promised reforms (Preliminary Inj. at 6). This makes it difficult for the DCFS to argue that a requirement of "reasonable efforts" is too ambiguous to be enforceable. The district court sought out and discovered a method of enforcing the "reasonable efforts" requirement that is tailored to DCFS practices. In this way, the district court has refrained from injecting itself into the operations of the DCFS any further than is required by the federal right that is enforceable under Section 1983.

As the Fourth Circuit held, after reviewing an action under Section 1983 for the enforcement of rights created by the same provisions at issue here:

> Taken together we think that these statutory provisions spell out a standard of conduct, and as a corollary[,] rights in plaintiffs, which plaintiffs have alleged have been denied. It is true that the statutes are largely statutes relating to appropriations, but defendants' argument to the contrary notwithstanding, they are privately enforceable under 42 U.S.C. § 1983. *L.J.* ex rel. *Darr,* 838 F.2d at 123 (1988).

2. Congressional Intent to Foreclose § 1983 Remedy.—In the absence of either a comprehensive remedial scheme for violations of a statute or an explicit, exclusive private cause of action found in the statute itself, Congress cannot be said to have intended to foreclose Section 1983 as a remedial vehicle for statutory violations. *Wright,* 479 U.S. at 423; accord *Wilder,* 110 S. Ct. at 2523-2524. The availability of a state administrative review procedure does not necessarily foreclose a Section 1983 cause of action, *Patsy v. Board of Regents of Florida,* 457 U.S. 496, 516, nor does the ability of the overseeing federal agency to reduce or cut off federal funds for violations of the AAA. *Wilder,* 110 S. Ct. at 2519; *Wright,* 479 U.S. at 424, 428.

The AAA provides that if any state plan fails to abide by the conditions set forth in Section 671(a), the Secretary may reduce or cut off funding. 42 U.S.C. § 671(b). The Act does not provide for private citizen suits directly or the right to judicial review or a comprehensive system of procedures and guarantees. None of the district courts in this Circuit that have considered such suits have found that the limited remedial scheme found in the AAA indicates an intent on behalf of Congress to foreclose Section 1983 as a remedy for violations of the Act. *Norman v. Johnson,* 739 F. Supp. 1182, 1185 (N.D. Ill. 1990) (Hart, J.); *B.H. v. Johnson,* 715 F. Supp. 1387, 1403-1404 (N.D. Ill. 1989) (Grady, C.J.); *Aristotle P. v. Johnson,* 721 F. Supp. 1002, 1011 (N.D. Ill. 1989) (Williams, J.). In light of the limited nature of the review provisions under the Act and the lack of any comprehensive remedial scheme, Congress did not intend to foreclose resort to Section 1983 as a cause of action under the AAA.

B. *Implied Cause of Action Under the Act*

The AAA does not expressly authorize a private right of action enabling those disadvantaged by its violation to enforce its terms. Nevertheless, even if the plaintiffs could not pursue their claims under Section 1983, we conclude that the AAA contains an implied right of private action.

Four factors are to be used in attempting to determine whether Congress intended to make a private remedy available: (1) whether the statute was enacted for the benefit of a special class of which the plaintiff is a member; (2) whether there is any indication of legislative intent to create a private remedy; (3) whether such a remedy is consistent with the underlying purposes of the legislative scheme; and (4) whether a federal remedy is inappropriate because the subject matter involves an area that is primarily of concern to the states. *Cannon v. University of Chicago,* 441 U.S. 677, 717; *Cort v. Ash,* 422 U.S. 66, 78. The Court determined in *Cort* that there was no private right of action for a derivative

suit against corporate directors based upon alleged violation of federal criminal statutes prohibiting certain expenditures of corporate funds on behalf of political candidates largely because the criminal statutes were not enacted for benefit of shareholders. *Cort*, 422 U.S. at 81-82. The majority of the Court in *Cannon* found a private right of action in Title IX of the Education Amendments of 1972 on the basis of all four *Cort* factors in the case of a petitioner who alleged that her applications for admission to medical school were denied because of her sex. The Supreme Court has repeatedly emphasized that the goal is to determine congressional intent, emphasizing the second and third of the four factors. See, *e.g.*, *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16; *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536. Although this inquiry closely resembles the analysis courts use to determine whether a Section 1983 cause of action exists, the burden of demonstrating the existence of each factor lies with the plaintiff asserting the right as opposed to the defendant. *Boatowners*, 716 F.2d at 674; see also *Wilder*, 110 S. Ct. at 2517 n.9; *id.* at 2526 (Rehnquist, C.J., dissenting).

The DCFS again asserts that nothing in the AAA supports the existence of any enforceable rights under the Act. The right asserted by plaintiffs, namely the right to have the DCFS exert "reasonable efforts" to prevent removal of the child from home and "reasonable efforts" to return the child to her home once removed, is unenforceable according to the DCFS for the same reasons that the right is supposedly unenforceable under Section 1983. The district court disagreed with the DCFS and found that such a right exists, citing *Cort v. Ash*, *supra*, *B.H. v. Johnson*, *supra*, and *Wolfe v. New Mexico Dep't of Human Services*, 575 F. Supp. 346, 353 (D.N.M. 1983). In *B.H.*, Chief Judge Grady held that plaintiffs had an enforceable right under Section 1983 to the "case plan" and "case review" requirements found in Section 671(a)(16). Judge Shadur reasoned that to imply an enforceable right under Section 671(a)(16) but not under the subsections re-

lied upon by the plaintiffs here, even though both provisions were contained in the Section outlining required plan features, would be inconsistent since both were conditions for the receipt of federal funds under the Act. *Artist M.*, 726 F. Supp. at 694-695.

The DCFS attempts to distinguish the right enunciated in Section 671(a)(16) from the rights set forth in Sections 671(a)(15) and 671(a)(9) by noting that the Act defines those rights and contains very specific guidelines for implementing the case plan and case review provisions. Yet there is no indication that Congress intended to create a single right to the exclusion of all other alleged rights in an Act; Congress is not required to spell out all rights intended to be created by a federal law merely because it chooses to spell out one. Moreover, the Act's failure to provide a definition of each right is not fatal to plaintiffs' claims. *Wilder*, 110 S. Ct. at 2516, 2525 (failure of Congress to define "reasonable and adequate" did not preclude finding of substantive, enforceable right).

The district court's decisions in this case are not, as the DCFS argues, an invitation for these and future plaintiffs to use the AAA as a tool for federal court interference with all state decisionmaking with respect to its vast child welfare system. As the district court explains in its supplementary findings, under the current system as structured by the DCFS, the assignment of a caseworker is absolutely essential if the DCFS is to make even the first efforts, much less reasonable ones, to maintain the child's family ties, to work towards reunification of the family if appropriate, and to ensure the child's well-being. The district court's injunctive relief does not dictate a method of assigning caseworkers or interfere with the ability of caseworkers to exercise their own professional judgment on the job.[11] The court is not creating

[11] The DCFS argues that in requiring the assignment of a caseworker within three days, the DCFS is deprived of the "flexibility" to make

(footnote continued on next page)

federally enforceable rights to beds, monetary assistance, or housing. The injunction merely fulfills the minimal requirement of the AAA that reasonable efforts are made towards the goals of reducing unnecessary foster care placement and family disruption, and it does so through a method designed to maximize DCFS decisionmaking.

The First Circuit made an analoguous holding in *Lynch v. Dukakis,* 719 F.2d 504, 514 (1983). A class action suit filed on behalf of all children within the jurisdiction of the Massachusetts foster care system alleged in part that the requirements of 42 U.S.C. §§ 671(a)(16), 675(1), 675(5)(B), that the state develop a "case plan" for each child and periodically review the status of the plan could not be met because caseworkers were not promptly assigned to the children in the class. Just as the DCFS argues here that the prompt assignment of caseworkers is not a procedural right guaranteed by the AAA, the defendants in *Lynch* argued that the district court had exceeded its authority by requiring Massachusetts to assign all cases to a caseworker within 24 hours of receipt of a case. *Lynch,* 719 F.2d at 514. The First Circuit quoted with approval the logic of the district court's reasoning: " 'It is evident that when a case is not assigned to a social worker directly responsible for servicing the case, the case planning and periodic review mandated by Title IV-E will not be provided.' " *Id.* It is similarly evident here that when a child is not promptly assigned to a caseworker "reasonable efforts" are not being made, as Congress intended, to "lessen the emphasis on foster care placement and * * * encourage greater efforts to find permanent

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assignments at different rates of speed depending on the gravity of the case or the expertise required (Reply Br. at 23 n.26). The gravamen of the district court's finding, however, is that for each and every member of the class the prompt assignment of a caseworker is a necessary first step toward the "reasonable efforts"required under the AAA. It is difficult to see how this minimal requirement hinders the DCFS in applying greater or lesser degrees of expertise to particular cases at any stage of the process.

homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes."

The Sixth Circuit cited *Lynch* favorably when presented with the suit of a mother seeking, through a Section 1983 action, to enjoin Kentucky social workers from depriving the mother of the "meaningful visitation" purportedly guaranteed by the AAA. *Scrivner v. Andrews,* 816 F.2d 261, 263 (1987). The *Scrivner* court affirmed dismissal of the suit, however, in part on the ground that it could not find such a visitation right in the AAA. Visitation rights are not involved in this case.[12]

Finally, a word is necessary regarding the claim by DCFS that even if other members of the class could maintain an action under the terms of the AAA, children living at home under Juvenile Court orders have no standing to sue. As Judge Shadur explained in analyzing the relevant provisions of the AAA, the language of that statute does not reveal an intention by Congress to limit its terms only to children actually in foster care outside the home, *Artist M.,* 726 F. Supp. at 695, and the DCFS fails to provide a compelling reason to read such a distinction into the statute.

IV. Preliminary Injunction

Plaintiffs' complaint states a cause of action. That requires us to consider the grant of the preliminary injunction. The Court reviews the district court's factual determinations for clear error, Fed. R. Civ. Pro. 52(a), while the legal conclusions are reviewed *de novo. Schwinn Bicycle Co. v. Ross Bicycles, Inc.,* 870 F.2d 1176, 1181 (7th Cir. 1989).

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[12] A panel of the Fifth Circuit has also held that Louisiana officials were not entitled to a qualified immunity defense against a Section 1983 action alleging a series of violations of the AAA that would have amounted to "wholesale neglect" by the officials. *Del A. v. Edwards,* 855 F.2d 1148, 1153-1154 (1988). That decision, however, was vacated for a rehearing en banc, 862 F.2d 1107 (1988), and the appeal was subsequently dismissed without opinion when the plaintiffs voluntarily dismissed their damages claim, 867 F.2d 842 (1989).

The district court correctly evaluated the request for injunctive relief in accordance with *Roland Machinery Co. v. Dresser, Inc.*, 749 F.2d 380 (7th Cir. 1984). After hearing or reviewing extensive testimony, exhibits, and other submissions, the experienced and capable district judge found that plaintiffs introduced ample evidence to support their allegation that they were being deprived of the services to which they were entitled under Section 671(a)(15) as a result of the DCFS practice of not assigning a caseworker to them within a reasonable time period. Judge Shadur further found that the plan being implemented by DCFS to remedy the delay in this assignment still did not assure that caseworkers were assigned, and that without a caseworker many services would be denied members of the class. Accordingly, the court determined that plaintiffs had more than a reasonable likelihood of prevailing on the merits of their claim (App. at 7). A review of the evidentiary transcripts indicates that the district court's finding in this regard is correct. This finding is only reinforced by the further findings issued July 25, 1990, in which the court found that the DCFS has failed to restructure its programs in any effective way in response to its systematic violations of the AAA.

The district court further found that plaintiffs would suffer irreparable harm if the preliminary injunction did not issue. The facts established below indicated that the irreparable harm borne by plaintiffs as a result of the delay in assignment included an increased likelihood that families would be broken up or remain apart, that plaintiffs would be deprived of protective services, and that, in the absence of timely case plans and case reviews, children would be left in "unnecessarily restrictive or dangerous placements, denied * * * essential visits with their parents and place[d] * * * at risk of further injury" (App. at 5). Against these harms the court weighed the harms alleged by the DCFS. Those included adding an extra layer of bureaucracy to the already overburdened agency and diverting resources from other agency

services in order to accommodate an increased number of caseworkers. The balance of harms clearly weighed, in the district court's analysis, in favor of a preliminary injunction.

A review of the findings indicates that the district court's determination that the balance of harms weighs heavily in plaintiffs' favor is not an abuse of discretion, especially in light of this Circuit's rule that monetary loss, here to the DCFS, does not constitute an irreparable injury. *Classic Components Supply, Inc. v. Mitsubishi Electronics America, Inc.*, 841 F.2d 163, 164-165 (7th Cir. 1988).

V. Conclusion

In light of *Wilder v. Virginia Hosp. Ass'n*, 110 S. Ct. 2510, plaintiffs may maintain a cause of action under Section 1983 for alleged deprivations of their federal statutory rights under the AAA. In addition, under *Cort v. Ash*, 422 U.S. 66, plaintiffs may pursue a cause of action against the DCFS directly under the Act. Plaintiffs have established the propriety and justified the scope of the preliminary injunction.

The district court's orders denying the DCFS motion to dismiss and granting plaintiffs' motion for a preliminary injunction pending trial are affirmed. The affirmance includes the April 3, 1990, amendment to the preliminary injunction.[13]

MANION, J., *dissenting.* The Illinois Department of Children and Family Services (the DCFS) may have one of the most difficult assignments in the state. The horror stories recited by the district court produce an almost irresistible desire for judicial intervention. Although the majority presents a compassionate argument supporting such intervention, I must respectfully dissent.

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[13] The Court appreciates the views presented by the *amici* American Civil Liberties Union, *et al.*, and the *amici* Joann Mitchell, *et al.*

Contrary to the court's holding, I believe that the "reasonable efforts" clause of § 671(a)(15) of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 620-628, § 670-679(a) (the "AAA"), is too ambiguous and indefinite to form a basis for a recognizable right and an enforceable obligation under the AAA or § 1983.

The district court and now this court have found that the AAA creates an individually enforceable right to "reasonable efforts" which, at this point, under the injunction invoked by the district court, means that a caseworker must be assigned to each child within three days after that child comes into the custody or under the protection of the DCFS. The majority cites the recent Supreme Court decision of *Wilder v. Virginia Hospital Association*, 110 S.Ct. 2510 (1990), as authority for establishing a child's right to "reasonable efforts" under the AAA. I respectfully disagree. *Wilder's* holding relates to a statutory provision and facts discernably different from that of the present situation. We should instead observe the more applicable legal standards and reasoning of *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), which generally discusses the circumstances in which enforceable rights are derived from a statute's language.

At the outset, I should add that I am not questioning whether an individual child injured by DCFS operations ever has a right of action under § 1983 and the AAA for violations of statutory or constitutional rights. For example, a foster child has a right to sue under § 1983 to enforce his due process right not to be placed with foster parents who the DCFS knows or suspects to be abusive. *K.H. v. Morgan*, 914 F.2d 848 (7th Cir. 1990). The deliberate indifference in the placement of siblings, *Aristotle P. v. Johnson*, 721 F.Supp. 1002 (N.D. Ill. 1989) or the placement of children in homes which detrimentally affect a child's emotional and physical well-being, *B.H. v. Johnson*, 715 F.Supp. 1387 (N.D. Ill. 1989), provide grounds for suit under § 1983 to remedy alleged constitutional violations. But the "reasonable efforts" language in

the AAA which promotes keeping a child in his home or returning him to his home presents no constitutional guarantees, nor does it create any private statutory rights as established by the Supreme Court, see *Pennhurst*, *supra*, and *Wright v. Roanoke Development and Housing Authority*, 479 U.S. 418 (1987). I therefore conclude that the "reasonable efforts" clause of the AAA does not establish any substantive rights enforceable under the AAA itself or through § 1983.

I.

Section 1983 permits individual legal action for violations by State agents of federal "rights, privileges, or immunities." This remedy is not available for simple violations of federal law. *Maine v. Thiboutot*, 448 U.S. 1 (1980). To establish a federal right, a statute must create an obligation binding on the governmental unit. The law must do "more than express a congressional preference for certain kinds of treatment." *Pennhurst*, 451 U.S. at 19. The interest the plaintiff asserts must not be "too vague and amorphous" to be "beyond the competence of the judiciary to enforce." *Wright*, 479 U.S. at 431-32.

The majority concludes *Wilder* supports plaintiff's action under § 1983. In *Wilder* the plaintiff hospital association questioned the "reasonableness" of reimbursement rates established by a state to compensate health-care providers for rendering medical services under the amended Medicaid Act, 42 U.S.C. § 1396. The Court examined a provision of the Medicaid Act (the Boren Amendment) which obligated the states, as a condition for receiving federal financial assistance, to adopt "reasonable and adequate" reimbursement rates for health-care providers rendering services under the Act. The Boren Amendment further stipulated that such "reasonable and adequate" reimbursement rates were to meet the costs of "efficiently and economically operated [medical] facilities." The defendant State resisted the suit claiming that the Boren Amendment did not create rights for health care providers

and that the "reasonable and adequate" standard was vague and thus beyond the competence of the court to interpret.

The Court in *Wilder* permitted the health care providers' suit based largely on its findings that (a) the Boren Amendment imposed a binding obligation on the states participating in the Medicaid program to adopt reasonable and adequate rates for the benefit of health-care providers, and (b) the obligation of the state to adopt rates that are reasonable and adequate was not too vague and amorphous to be judicially enforceable. The Court thus affirmed the principle that a State's denial of its own clearly annunciated obligations provides grounds under § 1983 for action by the intended beneficiaries.

In *Wright v. City of Roanoke Development & Housing Authority, supra*, which the *Wilder* Court explicitly followed, tenants in low-incom housing claimed they were overbilled for utilities in violation of rent ceilings imposed by the Brooke Amendment to the Housing Act of 1937,[1] and its regulations. The Court concluded the statute and regulations did create rights as derived from identifiable obligations of the states which were enforceable under § 1983. The Brooke Amendment limits the amount of rent a public housing tenant can be charged, and regulations adopted pursuant to the statute require inclusion of a "reasonable" allowance for utilities in the rent. 479 U.S. at 430. The Court reasoned that both the statute and the regulations were "mandatory limitation[s] focusing on the individual family and its income." *Id.* at 430. Additionally, the Court rejected the argument that the provision for a "reasonable" utility allotment was too vague to create an enforceable right. Because the regulations set out guidelines for the housing authorities to follow in determining the utility allowance, the right was "sufficiently specific and definite to qualify as [an] enforceable righ[t] under *Pennhurst* and § 1983 [and was] not . . . beyond the competence of the judiciary to enforce." *Id.* at 432.

[1] 42 U.S.C. § 1437a.

In both *Wilder* and *Wright*, the Court gave substance to a statutorily designated standard of "reasonableness" in § 1983 actions. *Wilder* interpreted and enforced "reasonable" rates, *Wright* interpreted and enforced "reasonable" allowances for utility payments. However, the judicial treatment of the "reasonableness" language found in *Wilder* and *Wright* should have no bearing on this case. Under the statutory language in *Wilder*, the court need only recognize the requirement of the states to establish "reasonable and adequate" reimbursement rates. This requires little more than a comparison of the State's established rates for medical services to those customarily charged by health care providers for the same or similar treatment. A federal judge under this statutory scheme can easily discern whether the state's proposed rates were out of line. Likewise, a court has total competence to determine the reasonableness of utility allowances by comparing them to local utility rates.

Both the *Wilder* and *Wright* Courts construed the reasonableness of specific governmental requirements. The disputed "reasonable efforts" clause of the AAA allows no such precision. The "reasonable efforts" clause creates no specific mandate to the DCFS. Therefore there is nothing for the court to determine as being reasonable or unreasonable. Rather than concentrating on the "reasonableness" of a particular governmental activity, § 671(a)(15) relates to the overall reasonableness of every aspect of the foster care program. This significantly distinguishes the present case from *Wilder* and *Wright*. Indeed, it is not at all apparent from reading § 671(a)(15) what precisely are the states' obligations under the AAA, and what enforceable rights have been established for the AAA's beneficiaries. A state's duty to exert "reasonable efforts" in general does not suggest any particular obligation. In contrast, a court can easily determine and enforce a state's obligation to establish "reasonable" reimbursement rates, or provide for "reasonable" utility allowances when setting public housing rents.

Additionally, this court insists that *Wilder* categorically rejects the argument that "reasonable" and "adequate" are vague and unenforceable and concludes the courts are capable of determining whether a state is exerting "reasonable efforts." (*Ante*, pp. 10-12, and 16) What *Wilder* actually says, however, is that a standard like reasonableness is not vague or unenforceable when judged "against an objective benchmark of an 'efficiently and economically operated facility' . . ." 110 S.Ct. at 2523. Similarly in *Wright*, the Court felt competent to enforce the "reasonable" allowance standard only with reference to the objective benchmark of "the individual family and its income." Both "benchmarks" provide a basis for a relatively simple judicial calculation. But in the present case, the AAA provides no such objective benchmark. Rather, the Act gives a general directive that is much too broad to give a federal judge a proper gauge from which to measure reasonable efforts.

In *Pennhurst*, the Court explored the problem of using ambiguous statutory language to establish state obligations and beneficiary rights. The Supreme Court held in *Pennhurst* that § 6010 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6000 *et seq.* (the "DDA"), did not create rights enforceable under § 1983 or under the DDA. The plaintiffs in the case, mentally retarded patients at a state hospital, brought suit challenging the conditions of their confinement. Plaintiffs claimed that the treatment they actually received conflicted with provisions conditioning the receipt and availability of federal funds upon state efforts to provide patients with "appropriate treatment" in the least restrictive manner. Since Pennsylvania received money under the DDA, plaintiffs filed suit under § 1983 claiming a violation of their statutory right to "appropriate treatment." The Court found the language "appropriate treatment" and "least restrictive" setting to be "largely indeterminate" and "too thin a reed" to support a creation of rights and obligations on the states. 451 U.S. at 19. "It is difficult to know what is meant

by providing 'appropriate treatment' in the 'least restrictive' setting, and it is unlikely that a State would have accepted federal funds had it known it would be bound to provide such treatment." *Id.* at 24-25.

The Court also specified under what conditions statutory language would create substantive rights and obligations. "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds." *Id.* at 24. The Court analogized: "Legislation enacted pursuant to the spending power," such as the AAA, "is much in the nature of a contract . . . in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract', . . . [t]here can . . . be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.* at 17.

The crucial inquiry, therefore, is "not whether a State would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice." *Id.* at 25. The Court found that the statutory language in *Pennhurst* fell well short of providing clear notice to the State that they, by accepting the funds under the Act, would be obligated to provide "adequate treatment" as imagined by the plaintiffs. "[It] strains credulity to argue that participating States should have known of their 'obligations' under" the "adequate treatment" provision. *Id.*

As with the language in *Pennhurst*, the phrase "reasonable efforts" does not communicate or prescribe any specific set of practices which unambiguously notify Illinois of the conditions it must meet in order to receive federal help. "Reasonable efforts"

is an indeterminate statement, to say the least. Rather than being a specific mandate with explicitly detailed directives, § 671 merely encourages the state to set up a plan that outlines the state's proposed method to care for distressed children requiring removal or supervision by the DCFS. Subsection (a)(15) directs the plan to include provisions that "*in each case*, reasonable efforts will be made. . . ." Since every case will be different, "reasonable efforts" cannot be expected to be the same. The vagueness of "reasonable efforts" cannot create binding obligations and rights. Without proper congressional guidance we should refrain from inventing rights which interfere with the foster care system. The successful administration of the system requires substantial expertise and familiarity from its operating personnel and the juvenile courts that oversee each case. It is clear from its plain language that § 671(a)(15) is fashioned to give broad discretion to such child welfare professionals to determine what efforts are reasonable in each situation. Therefore, the courts should not intervene unless the system becomes violative of a child's constitutional rights or rights clearly established by statute.

II.

I conclude where this argument began—with the plaintiffs' complaint that the DCFS does not assign caseworkers quickly enough to meet the standards of the AAA once a child becomes a ward of the juvenile court under the supervision of the DCFS. I agree with this court that the AAA was designed to provide "incentives to encourage a more active and systematic monitoring of children in the foster care system." (*Ante*, p. 7 citing *State of Vermont Dept. of Social & Rehab. Srvs. v. United States Dept. of Health & Human Srvs.*, 798 F.2d 57, 59 (2d Cir. 1986). Incentives in this case do not create rights and binding obligations. A State's failure to perform under a Plan is remedied by Congress' foreclosing federal funding. That may be the only practical alternative under the AAA. Federal courts cannot properly supervise

every aspect of the DCFS operation, something they now may be expected to do given this opinion.

The magnitude of the court's assumed obligation is apparent under the terms of the district court's injunction. The district court enjoined defendant from:

> (a) Failing to assign a caseworker *capable* of providing child welfare services to each of the plaintiffs and their families within three working days of the time that plaintiffs' cases are first heard in juvenile court; and
>
> (b) Failing to assign a caseworker *capable* of delivering child welfare services within three working days of the time that a previously assigned caseworker relinquishes responsibility for any portion of a case.

(Emphasis added.)

The injunction refers to a caseworker "capable" of providing child welfare services. So, in addition to constructing "reasonable efforts" the court must construct the meaning of "capable" under the injunction. The injunction is not clear whether a caseworker "capable" of providing services is one who has the specialized training and ability, or who simply has the time to perform the services. One would hope both, but given the constraints on the system, that may be too much to hope for. The district court has already frowned upon *en masse* assignment of many cases to one caseworker, presumably even if done in three days.[2] The only solution may be very expensive (i.e., hiring and training many more caseworkers).

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[2] In an earlier disposition of this case, when this court entered a partial remand requesting the district court to enter factual findings concerning the current delays in caseworker assignment and reassignment, the district court, after a hearing, submitted a comprehensive set of findings. On the whole, these findings set out a complex set of problems and deficiencies related to the operation of the DCFS. These findings addressed the situation which existed as of March 2, 1990, the time the injunction was issued. The district court's finding 27 notes: "Cases that *were* reassigned during a caseworker's absence were reassigned en

(footnote continued on next page)

The right that we have created in this opinion will allow every child, by his next friend, to challenge the reasonable efforts of the caseworker. If the DCFS, through the recommendation and services of the caseworker, determines that the child should be placed in a foster home, the child's advocate could disagree and challenge the decision in federal court because, in his opinion, the "reasonable efforts" were unreasonable. The same goes for a child who is not put in a foster home, or for the child who is put in a foster home that for some reason (obviously other than his continued exposure to abuse, neglect, or exposure to physical or emotional trauma) is not to his liking.

We are confronted with a tragic class of people—children of alcohol and drug addicts, children victimized by severe domestic violence, children who are abused in unimaginable ways, children who are malnourished, sick and neglected. The district court's order requires that a caseworker be assigned in three days. But if the caseworker, even though assigned, is not meeting someone's definition of reasonable efforts, the district judge will again be petitioned to intervene. With this court's approval of the district court's finding that each of these children have an individual enforceable right to challenge the reasonable efforts of the DCFS, we can anticipate an avalanche of lawsuits seeking to obtain specific social services and mandatory injunctions governing every imaginable detail over the operation of the DCFS. Clearly this is far beyond the intent of Congress.

This opinion moves the court from its proper role as impartial arbiter of cases and controversies under the law to that of a crisis

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masse to a single caseworker, who by the nature and volume of the reassignments was not and could not be expected to provide services." From this it is difficult to see how the injunction is going to assist the overloaded caseworker and his already unmanageable workload. One wonders how the court must consider Finding 27 if a later dispute should emerge on whether such a caseworker is "capable" under the terms of the injunction.

administrator of child welfare. Ironically, this decision, while attempting to advance the well-being of abused children, may instead result in the delay or denial of benefits. Delay and denial will result because standing for injunctive and declaratory relief has now been extended to every plaintiff with a notion of "reasonable efforts" that conflicts with that of the DCFS. The DCFS will most likely experience considerable paralysis because any efforts deemed unreasonable by scrutinizing plaintiffs and courts could cease, resulting in no remedial efforts while litigation continues in situations where something must be done.

Until Congress specifies certain individual rights under the AAA, this court should confine § 1983 actions against the DCFS to alleged constitutional violations such as those in *K.H. v. Morgan*, *supra*, *B.H. v. Johnson*, *supra*, and *Aristotle P. v. Johnson*, *supra*, and otherwise stay out of what is now a reasonably streamlined and publicly accountable chain of command in the distribution of child welfare and assistance benefits. I would reverse the district court.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

December 20, 1990.

ARTIST M., *et al.*,
Plaintiffs-Appellees,

No. 90-1742
90-1764

vs.

JESS McDONALD, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 88 C 10503

Milton I. Shadur, *Judge.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed by defendants-appellants on November 13, 1990, and the answer of plaintiffs-appellees, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARTIST M., *et al.*,
Plaintiffs,

v.

GORDON JOHNSON, *et al.*,
Defendants.

No. 88 C 10503

MEMORANDUM OPINION AND ORDER

In December 1988 plaintiffs filed this action as a class action seeking declaratory and injunctive relief pursuant to the Adoption Assistance and Child Welfare Act of 1980 ("AAA"), 42 U.S.C. §§ 620-629, 670-679a—either under 42 U.S.C. § 1983 ("Section 1983") or perhaps via direct action—and under the Due Process Clause. Plaintiffs simultaneously filed a Motion for Preliminary Injunction and a Motion for Class Certification.

Upon presentation of plaintiffs' motions, defendants concurred in the propriety of certifying two classes of plaintiffs:

> Class A: Children who are or will be the subjects of neglect, dependency or abuse petitions filed in the Circuit Court of Cook County, Juvenile Division ("Juvenile Court"), who are or will be in the custody of Department of Children and Family Services ("DCFS") or in a home under DCFS supervision by an order of Juvenile Court and who are now or will be without a DCFS caseworker for a significant period of time.
>
> Class B: Children who are or will be the subjects of neglect, dependency or abuse petitions filed in Juvenile Court who are or will be placed in DCFS' custody and who are or will be without a DCFS caseworker for a significant period of time.

This Court entered a memorandum order certifying both classes, granting plaintiffs' request for expedited discovery and setting

plaintiffs' Motion for Preliminary Injunction for an early evidentiary hearing. After that hearing (the "Hearing") was held, with extensive evidence presented by both sides, the parties presented their post-Hearing submissions.

Defendants in this action are DCFS Director Gordon Johnson ("Johnson") and DCFS Guardianship Administrator Gary Morgan ("Morgan").[1] DCFS is the state agency charged with, among other things, investigating allegations of child abuse and neglect throughout Illinois and caring for children and families who are the victims of child abuse and neglect. This action is concerned solely with cases in the Cook County Region.

Plaintiffs complain that DCFS has a policy and practice of failing promptly to assign a caseworker to court cases following the issuance of a temporary custody or protective (or supervision) order and of failing promptly to reassign court cases when a caseworker goes on leave, is terminated or resigns. Plaintiffs claim that alleged policy and practice violates both AAA and the Due Process Clause.

Post-Hearing Procedures

This Court initially deferred issuance of its post-Hearing finding of fact and conclusions of law pending (2) then-awaited Supreme Court action and (2) DCFS' implementation of a

[1] Morgan testified that although he is named personally by the Juvenile Court as the custodian of children placed in the temporary custody of DCFS, day-to-day decisions regarding those children are made by DCFS personnel who are designated agents of the Guardianship Administrator and who are located in the Area Offices, Division of Child Protection, Interim Service Teams, Emergency Services Center and other units directly responsible for serving children in the care of DCFS. Morgan has no line authority over those persons, nor does he have any responsibility for developing generally any policies with respect to the care of children in DCFS' custody, or specifically with respect to the assignment of caseworkers. Accordingly, although named as a defendant, Morgan does not have any responsibility for the alleged practices and policies challenged in this action.

restructuring plan directly addressing the delays in caseworker assignments.[2] Then just after the end of the Supreme Court's last term this Court issued its July 24, 1989 memorandum opinion and order (the "Opinion," 1989 U.S. Dist. LEXIS 9040 (N.D. Ill.)), requesting supplemental submissions from the parties as to:

> 1. whether *Will v. Michigan Department of State Police,* 109 S.Ct. 2304 (1989) rendered Section 1983 unavailable to plaintiffs;
>
> 2. whether AAA confers on plaintiffs the implied right of action necessary to establish subject matter jurisdiction; and
>
> 3. what standard (intentionally inflicted harm or something less) should be applied to plaintiffs' Due Process Clause claims and whether plaintiffs can meet that standard.

After those supplemental submissions had been tendered, defendants moved under Fed. R. Civ. P. ("Rule") 12(b)(6) for dismissal of the Complaint with prejudice for failure to state a claim. Defendants assert that *no* legal basis exists for any of plaintiffs' claims, pointing to four claimed defects that raise issues substantially similar (if not identical) to those framed in the Opinion:

> 1. Class A plaintiffs lack standing to sue under AAA because they are not in foster care.
>
> 2. AAA neither authorizes a private right of action nor gives rise to enforceable rights under Section 1983 to secure continuous caseworker assignments.
>
> 3. Plaintiffs' Due Process Clause claim is flawed because the Fourteenth Amendment does not mandate immediate, continuous caseworker assignment and because plaintiffs do not contend defendants acted intentionally.
>
> 4. *Will* bars plaintiffs' claim for sweeping injunctive relief.

This opinion addresses each of those contentions, though not in the same order.

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[2] During the Hearing DCFS representatives had testified as to its adoption and ongoing implementation of that plan.

Implied Statutory Rights of Action and Section 1983 Rights of Action

Despite defendants' confluence of analysis as to the existence vel non of implied rights of action under AAA and enforceable rights under Section 1983, those are really two distinct inquiries. *Samuels v. District of Columbia*, 770 F.2d 184, 194 (D.C. Cir. 1985) confirms that "statutory Section 1983 claims differ significantly from implied private rights of action." *Boatowners and Tenants Association, Inc. v. Port of Seattle*, 716 F.2d 669, 674 (9th Cir. 1983) underscored that difference:

> There are both substantive and evidentiary distinctions between the two causes of action.

Because of those distinctions and in the interest of clarity, this opinion will examine each type of claim individually.

1. *Implied Rights Under AAA*

About the only legal proposition the parties here agree upon is that *Cort v. Ash*, 422 U.S. 66, 78 (1975) establishes the framework for determining whether a statute contemplates an implied right of action for a given individual or class. To that end *Cort*, *id.* (citations omitted, emphasis in original) calls for this inquiry:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted" . . .—that is, does the statute create a federal right in favor of the plaintiff? . . . Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Later refinements of the *Cort* analysis have brought matters to the situation well summarized in *King v. Gibbs*, 876 F.2d 1275, 1280-81 (7th Cir. 1989):

> In its recent pronouncements, the Court has reaffirmed the use of the *Cort* test but has also made it clear that the principal focus is on the second of the *Cort* factors—whether the legislature intended to create a private cause of action. *See Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Touche Ross & Co. v. Redington*, 422 U.S. 560, 568 (1979). The first and third of the *Cort* factors are aids in determining that intent, *Touche Ross*, 422 U.S. at 575-76; *see also* P. Bator, D. Meltzer, P. Mishkin, D. Shapiro, *The Federal Courts and the Federal System* 946 (1988), and, by negative implication, it is unclear whether the fourth *Cort* factor—whether the cause of action is generally thought of as a matter of state concern—has any continuing significance. *But see Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 465 U.S. 353, 393 (1982) (Court noted that fourth *Cort* factor favored implying private right of action under a provision of the Commodities Exchange Act.). In sum, unless a congressional intent to create the right of action "can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 94 (1981).

It was against that backdrop that Opinion at 8 stated:

> At least until otherwise demonstrated, then, it must be considered that AAA provides plaintiffs no direct ticket of entry to this federal court.

That was not of course a prejudgment of the issue—it rather confirmed that the burden rested on plaintiffs to make an affirmative showing of congressional intent to create a private right of action (*Boatowners*, 716 F.2d at 674). Now they have sought to do just that.[3]

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[3] Until plaintiffs were called upon to respond to the Opinion, they had dealt only with issues bearing on the viability of a Section 1983 action. This is the first opportunity this Court has had to evaluate plaintiffs' arguments bearing on the implication of a private right of action under AAA.

AAA's enactment antedated the Supreme Court's toughening stance on the implication of private causes of action for statutory violations. It is hardly surprising, then, that AAA's provisions neither expressly create nor expressly deny a private right of action, and its legislative history is equally silent in that respect. Consequently the search has to shift to the general language and structure of the statute and to the circumstances of its enactment (see *Thompson v. Thompson*, 108 S.Ct. 513, 516 (1988)).

Initially plaintiffs urge that the circumstances surrounding AAA's enactment support implication of a private right of action. AAA was adopted as an amendment to the Social Security Act, a statute as to which the Supreme Court has allowed private enforcement (e.g., *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980); *Miller v. Youakim*, 440 U.S. 125 (1979)). But that fact does not support the parallel inference plaintiffs seek to draw, for the cases to which they point were brought under Section 1983 and *not* directly under the substantive statute (the Social Security Act). Thus the amendatory character of AAA and the enforcement history of the underlying Social Security Act cannot alone carry the weight plaintiffs attempt to rest on their shoulders.

Nonetheless other courts have found support in AAA's language and internal structure for the implication of some rights of action. Such cases as *B.H. v. Johnson*, 715 F.Supp. 1387, 1402 (N.D. Ill. 1989) and *Joseph A. by Wolfe v. New Mexico Department of Human Services*, 575 F.Supp. 346, 353 (D. N.M. 1983) have allowed private plaintiffs to enforce the statute's procedural requirements of case plans and case reviews—a development conceded by defendants (Mem. 12).[4] Such private rights of enforcement are inferred from two parallel provisions of AAA:[5]

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[4] Although they make that concession, defendants contend that the Complaint here fails to allege a violation of those rights. That contention is fully addressed below.

[5] Because AAA (like Section 1983) is found in Title 42, its provisions will also be cited simply "Section—."

> 1. Section 627(a)(2)(B) says the eligibility of a state to receive an appropriation under AAA is predicated upon its implementation and operation of "a case review system . . . for each child receiving foster care under the supervision of the state."
>
> 2. Section 671(a)(16) reiterates that requirement by listing as a "requisite" feature of each State plan that it "provide [ ] for the development of a case plan . . . for each child receiving foster care maintenance payments . . . and . . . for a case review system . . . with respect to each such child."

If those provisions suffice to grant private enforcement rights to the children for whom such case plan and case reviews are required, it seems only logical to draw parallel inferences from other requirements enumerated in the selfsame sections. Section 627(a)(2)(C) conditions a State's eligibility for AAA appropriations on its implementation and satisfactory operation of "a service program designed to help children, where appropriate, return to families from which they have been removed or be placed for adoption or legal guardianship." Similarly Section 671(a) imposes not only the already-quoted case plan and review requirements but also mandates that every State plan must:

> (9) provide [ ] that where any agency of the State has reason to believe that the home or institution in which a child resides whose care is being paid for in whole or in part with funds provided under this part or part B of this subchapter is unsuitable for the child because of the neglect, abuse, or exploitation of such child, it shall bring such condition to the attention of the appropriate court or law enforcement agency;
>
> * * *
>
> (15) . . . provide [ ] that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home. . . .

Certainly there is nothing to distinguish among the several statutory requirements—to suggest that one is less mandatory than the others. And that equal emphasis is confirmed by AAA's legislative history. In the Joint Explanatory Statement of the Committee of Conference, H. Conf. Rep. No. 96-600, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Ad. News 1566-67, both "#6. Case Plan & Case Review System" and "#7. Preventive and Reunification Services" were given parallel billing among the subheadings listed under the heading "New Foster Care (and Adoption Assistance) State Plan Requirements."

In sum, if private plaintiffs have the right (as defendants in fact acknowledge they do) to enforce their statutory entitlements to case plans and case reviews, the rights of the plaintiff class here to obtain preventive and reunification services must enjoy the same standing.[6] Hence the predominant *Cort* factor—that of inferred legislative intent—is satisfied. And as the ensuing discussion reflects, the consideration of other *Cort* factors leads to the same conclusion.

For one thing, Congress certainly enacted AAA for the "especial benefit" of children coming within both Class A and Class B here—that is, both children in DCFS custody *and* children who are the subject of petitions filed in Juvenile Court but who remain at home under DCFS supervision by order of that court. Defendants give a distorted picture of AAA, arguing that States are

[6] To the extent *B.H.*, 715 F.Supp. at 1401 reaches a different conclusion, this Court must disagree. *B.H., id.* coupled the "least restrictive setting" provision for individual placements with the statutory mandate of "reasonable efforts," finding each insufficient to create enforceable affirmative obligations on the states. Whatever the infirmities of the first of those criteria may be in that respect, they do not infect the "reasonable efforts" mandate. Courts have long proved themselves adequate to the task of enforcing contractual "best efforts" obligations, and they equally regularly enforce commitments of parties to conduct themselves "reasonably." No reason appears to treat AAA's statutorily-created contract any differently.

given funds to provide services only to children *in* foster care. That reading glosses over (or misses entirely) the provisions strewn throughout AAA that require (not just encourage) States to provide services to children and families *in their homes* in an effort to reduce the numbers of children needing foster home placement:

> 1. Section 670 states "there are authorized to be appropriated for each fiscal year . . . such sums as may be necessary to carry out the provisions of this part."
>
> 2. As already stated, Section 671(a)(15)(A) (emphasis added) requires that the State make reasonable efforts "*prior to* the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home. . . ."
>
> 3. It is also worth noting that Section 627(b)(3) (emphasis added) requires a reduction in Title IV-B funds "unless such State . . . has implemented a preplacement preventive service program designed to help children *remain* with their families."[7]
>
> 4. Section 672(a)(1) includes among the children qualifying for foster care maintenance payments program those whose "removal from the home occurred [as] the result of a judicial determination to the effect that . . . reasonable efforts of the type described in section 671(a)(15) of this title have been made."

In light of these extensive statutory references to preplacement services, defendants' assertion that AAA applies only to children

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[7] While Class A plaintiffs make no claims under that section, its very existence evidences Congress' intent to benefit not only children in foster care but also those children who, by virtue of being before the Juvenile Court, face the prospect of being taken into foster care. Defendants claim that reading AAA to apply to those children will in turn given rights of action to *all* children in the State—but that totally ignores the point that DCFS has filed a petition for adjudication of wardship in the Juvenile Court for every member of Class A, a fact that obviously sets those children apart from all others living at home inside the State.

in foster care must be perceived as untenable (if not indeed disingenuous).

Finally, implying a private right of action is fully consistent with the underlying purposes of the legislative scheme—the third *Cort* factor. As the above analysis reflects, that scheme must be understood as having two related parts:

> 1. providing adequate services to children in foster care through a case plan and case review system; and
>
> 2. keeping as many children as possible out of the foster care system by providing preplacement preventive services and family reunification services.

To imply a private right of action to enforce the former, while denying such a right as to the latter, defies common sense. *Both* classes of plaintiffs have implied causes of action to enforce their rights as established under AAA.

2. *Section 1983 Enforceable Rights*

In contrast to the just-completed discussion, a plaintiff who invokes Section 1983 to complain of a federal statutory violation need not show congressional intent to provide access to that remedy (*Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 20 n.31 (1980)). Instead, as *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 425 (1986) articulates, Section 1983 is presumed to be available for such redress except where Congress has foreclosed such enforcement in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of Section 1983. Defendants claim both those exceptions apply here, but again they fail to persuade.

First defendants maintain that AAA does not create an enforceable right to prompt and continuous assignment of caseworkers. But whatever the validity of that proposition may be (a

question that need not be resolved in this opinion), it is simply a straw man here: It misstates, rather than addressing head on, the claims advanced by the plaintiff classes.[8] And as for the rights plaintiffs *do* advance, the just-completed analysis has confirmed the existence of directly enforceable statutory rights under AAA. To reject such enforceability via Section 1983 would be anomalous indeed in light of the uniform authority exemplified by *Wright.*

Courts have consistently confirmed Section-1983-enforceable rights to case plans and case review systems (*L.J. by and through Darr v. Massinga*, 838 F.2d 118, 123 (4th Cir. 1988); *Lynch v. Dukasis*, 719 F.2d 504, 510-12 (1st Cir. 1983); *B.H.*, 715 F.Supp. at 1402). This Court has already found those statutory commands equivalent to those called upon by plaintiffs here. And to the extent that *B.H., id.* at 1401 concluded that AAA's "reasonable efforts" provisions failed to meet the "clear" and "unambiguous" standard expressed in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (19[illegible]), as necessary to create a "contract" between the State and the federal government, this Court must again disagree.[9] Any State that read (or for that matter neglected to read) AAA and accepted federal funds under it had to know it was obliged both to provide case plan and case review services *and* to provide services aimed at preventing removal and facilitating reunification.

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[8] In part echoing AAA's statutory language, plaintiffs rather assert rights to (1) "reasonable efforts" to prevent removal of children from their homes, (2) "reasonable efforts" to facilitate reunification of families when removal has occurred, (3) notification of Juvenile Court or appropriate law enforcement agencies when a child is neglected, abused or exploited in placement and (4) development of case plans and a case review system to ensure that each child in placement is provided appropriate services. While the Complaint cites DCFS' failure promptly and continuously to assign caseworkers, it does so only in an attempt to illustrate the DCFS policies and practices that give rise to violations of the claimed rights.

[9] See n.6.

Nor does the holding in *Scrivner v. Andrews*, 816 F.2d 261, 263-64 (6th Cir. 1987) that AAA did not create enforceable rights to "meaningful visitation" change the conclusions here. No provision of AAA mandates "meaningful visitation" in terms—or even implicitly.[10] And while *Scrivner, id.* at 263 correctly noted that AAA affords the State "considerable flexibility in unilaterally developing administrative procedures" to implement its foster care program, that cannot render the State free to ignore other obligations expressly imposed by AAA's language. In that respect *Wright*, 479 U.S. at 431-32 made it plain that the use of the word "reasonable" in a statutory provision does not render the requirement too vague or ambiguous to be enforced.

Defendants also fail to demonstrate that Congress intended to foreclose the use of Section 1983 to enforce the rights secured under AAA. Although AAA does establish some enforcement mechanisms, they are not "sufficiently comprehensive and effective to raise a clear inference that Congress intended to foreclose a § 1983 cause of action . . ." (*Wright*, 479 U.S. at 425). To that end defendants point to three AAA provisions as the assertedly comprehensive remedial scheme:

> 1. the ability of the Secretary of the Department of Health and Human Services to withhold funds (Section 671(b));
>
> 2. the state plan providing for a post-deprivation hearing (Section 671(a)(12)); and
>
> 3. the dispositional hearing (Section 675(5)(c)).

Rosado v. Wyman, 397 U.S. 397, 420 (1969) rejected just such an argument based on a power wholly parallel to the first of those,[11] stating the Court was "most reluctant to assume Con-

[10] That absence of a specific obligation of the nature sought to be enforced in *Scrivner* contrasts sharply with the statutory duty to make specifically-defined "reasonable efforts," on which plaintiffs rely here.

[11] In *Rosado* the State defendant relied on HEW's power to cut off federal funds. It should also be emphasized that *Rosado* remains good law today (always a source of concern in citing Supreme Court decisions of a legal generation ago). It was cited as authority on precisely this point in *Wright*, 479 U.S. at 428.

gress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." And certainly the statute's limited administrative remedies (the second and third cited factors) do not constitute a comprehensive remedial scheme precluding Section 1983 relief (*Wright*, 479 U.S. at 424)—as *Lynch*, 719 F.2d at 512 recognized, they are utterly unresponsive to cases like the one at bar "where a class alleges systemic malfeasance."

It is clear, then, that AAA does create enforceable rights and that Congress has not precluded their enforcement with a comprehensive remedial scheme. Hence plaintiffs have a cause of action under Section 1983 as well as directly under AAA.

Will and the Eleventh Amendment[12]

This is undeniably an official-capacity lawsuit against Johnson. It therefore becomes necessary to examine *Will*'s restrictive definition of the "persons" entitled to invoke Section 1983.

Will, 109 S.Ct. at 2312 says flatly:

> Neither a State nor its officials acting in their official capacities are "persons" under § 1983.

Without more, that unqualified assertion would render Johnson —wearing his official-capacity hat—immune to plaintiffs' present action. But *Will*, *id.* at 2311 n.10 restores what the quoted sentence seems to take away: It imports familiar principles of Eleventh Amendment jurisprudence to provide an exception to the apparently rigid and restrictive definition of "persons." Calling on the fiction (originally expounded in *Ex parte Young*, 209 U.S. 123 (1908)) that any state official who violates constitutional rights is perforce stripped of his or her official character and is thus no longer protected by the sovereign's immunity, *Will*'s n.10 (citations omitted) says:

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[12] Since issuing the Opinion this Court has had occasion to address the issues treated in this section in *Illinois Health Care Ass'n v.*

(footnote continued on next page)

> Of course a State official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because "official capacity actions for prospective relief are not treated as actions against the State." . . . This distinction is "commonplace in sovereign immunity doctrine," . . . and would not have been foreign to the 19th-century Congress that enacted § 1983. . . .

Thus the operative question becomes whether plaintiffs' prayer for declaratory and injunctive relief falls into the category of actions seeking prospective relief, allowable under Section 1983 by *Will*'s n.10 and under the Eleventh Amendment by *Ex parte Young*, or into the disallowed category of actions seeking to tap the State treasury. By now it is familiar doctrine that the line between such allowed and disallowed actions is not one between night and day—for the simple fact that the sought-after relief will have adverse fiscal consequences for the sovereign will not automatically bar the claim (*Edelman v. Jordan*, 415 U.S. 651, 667-68 (1973)). Instead a court must look beneath the surface of plaintiffs' claims to determine their true objectives in the terms made dispositive by *Ex parte Young* and its progeny.

Edelman, *id.* at 668 has made it plain that no matter how it is labeled, any relief that amounts to a damage award will be barred by the Eleventh Amendment. Had plaintiffs here sought compensation for the claimed past harm stemming from Johnson's allegedly illegal foster care scheme, this Court would have had to dismiss their claim. But plaintiffs have made it equally clear that such is *not* their intention, nor would such reimbursement automatically flow from their success on the merits. As plaintiffs would have it, a declaration by this Court to the effect that Johnson is violating the specified provisions of AAA, coupled with an injunction compelling future compliance,

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Suter, 1989 U.S. Dist. LEXIS 12729 (N.D. Ill.). Instead of reinventing the wheel, this opinion borrows both freely and unabashedly from that prior effort.

would provide the necessary impetus (1) to force DCFS to live up to its obligations under AAA or (2) if it is unwilling to comply, to force it to bail out of the cooperative state-federal plan and go it alone in the area of foster care, free from the federal requirements.[13]

Obviously the latter option would involve no necessary drain on the sovereign's fisc. And although the alternative of compliance with AAA (which may be assumed to represent plaintiffs' preferred outcome) *would* impact state finances, the existence of such financial impact is not itself dispositive. As *Papasan v. Allain*, 478 U.S. 265, 278-79 (1985) teaches:

> [R]elief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury.

By contrast, *Edelman*, 415 U.S. at 668 held the underlying claim in that case was retrospective and violative of the Eleventh Amendment because the amount of fiscal burden placed on the State would be measured in terms of a monetary loss resulting directly from a *past* breach of a legal duty on the part of the defendant State officials.

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[13] Plaintiffs' prayer for relief seeks entry of a specific order requiring DCFS to adopt a plan with certain substantive elements. As long as such a plan was only forward-looking, it would not run afoul of the principles discussed in this section. It would, however, present another problem. While this Court must enforce the mandatory requirements of federal law, it should not become involved in micromanagement of the State child care system. Rather as *Lynch*, 719 F.2d at 513 (summarizing *Rosado*) noted:

> [I]n such cases the district court should announce what is necessary to comply with the federal program and then allow an appropriate period of time for the state to decide whether it preferred to forego [sic] federal funds. If the state decides to retain funding it must propose a plan for achieving compliance which would then be subject to court approval.

It seems the line between an "ancillary" economic effect (permitted by the Eleventh Amendment) and a "direct" effect (barred by that Amendment) depends on whether the finding of State violations of federal law will be accompanied by an order to make whole the individuals who were injured by those past violations. If the federal court simply orders a State to conform its future conduct to the requirements of federal law, even though that will cost money (even a good deal of it) the future impact on the State treasury is normally perceived as "ancillary" (*Quern v. Jordan*, 440 U.S. 332, 337 (1979)).

Here plaintiffs make no plea for reparations of the harm caused by Johnson's alleged past violations of the Act, asking instead only for a declaration as to whether Johnson's admitted conduct amounts to a continuing violation of the Act and, if that is so, for a preliminary injunction. Neither *Will* nor the Eleventh Amendment bars this action in Section 1983 terms.

Due Process Clause

DeShaney v. Winnebago County Department of Social Services, 109 S.Ct. 998, 1004-07 (1989) teaches that the Due Process Clause imposes no affirmative obligations on the State to provide services to the general public—instead, such duties attach only "in certain limited circumstances [where] the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals" (*id.* at 1004-05). For that reason Opinion at 11-13 directed the parties to address the inquiry as to whether Class B plaintiffs—those in DCFS' custody[14]—meet that test. That inquiry now gets an affirmative answer.

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[14] Only Class B plaintiffs assert violations of their rights to due process. Had Class A plaintiffs sought to do the same, that claim would have been blocked by *DeShaney*.

DeShaney, 109 S.Ct. at 1006 n.9 specifically left open the question as to whether children whom the State removes from their homes and places in foster homes enter into a special relationship with the State giving rise to an affirmative right to protection. Despite that properly cautious reservation of an issue not directly before the Supreme Court, this Court finds strong signals in *DeShaney*'s characterization of the treatment of involuntarily committed mental patients in *Youngberg v. Romeo*, 457 U.S. 307, 315-17 (1972). *DeShaney*, 109 S.Ct. at 1005-06 (citations omitted) explained *Youngberg* this way:

> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

To counter the parallel thrust of *Youngberg* (and its reconfirmation in *DeShaney*), defendants adduce *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 510-11 (1981) for the proposition that children in foster care are not under the direct physical control of the State and are no more restrained than children living with their own parents. *Lehman* cannot rule the day. It was a habeas case that addressed a set of concerns (whether the children were in "custody" in traditional habeas terms) very different from those relevant here. But when DCFS obtains an order to remove a child from his or her home and takes that child into protective custody, it is surely exercising affirmative State power over that child to the extent that it must assume responsibility to provide for the child's basic needs. To hold otherwise would be to turn a blind eye on the realities facing a child who has been removed from home. Many courts (see, e.g., this Court's opinion in *Rubacha by Rubacha v. Coler*, 607 F.Supp. 477, 479 (N.D. Ill. 1985), and see cases collected in *DeShaney*, 109 S.Ct. at 1006 n.9) have reached precisely that conclusion.

Establishment of the required "special relationship" between the State and the Class B plaintiffs does not end the inquiry. It remains to consider by what standard the State's conduct must be measured under the "special relationship" doctrine. In that respect *Archie v. City of Racine*, 847 F.2d 1211, 1218-20 (7th Cir. 1988) provides the necessary guidance.

Archie began with the basic rule of *Daniels v. Williams*, 474 U.S. 327, 331-36 (1986) and *Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986) that merely negligent State conduct does *not* constitute a deprivation under the Due Process Clause. *Archie* went on to the question left open by *Daniels*, *id.* at 334 n.3:

> Whether something less than intentional conduct, such as recklessness or "gross negligence," is enough to trigger the protections of the Due Process Clause.

Because " '[r]ecklessness' is a proxy for intent [and] 'gross negligence' is not," *Archie*, 847 F.2d at 1220 reasoned that only recklessness or something greater can give rise to a due process violation. And because use of the tort law definition of recklessness would not adequately distinguish between constitutional and common law obligations, *Archie*, *id.* at 1219 explained further:

> An act is reckless in the pertinent sense when it reflects complete indifference to risk—when the actor does not care whether the other person lives or dies, despite knowing that there is a significant risk of death.

Here Class B plaintiffs allege violations of their "constitutionally protected interests in conditions of reasonable care and safety" (*Youngberg*, 457 U.S. at 324), including both physical safety (*Rubacha*, 607 F.Supp. at 479) and emotional well being (*B.H.*, 715 F.Supp. at 1394). Thus the proper inquiry is whether defendants' conduct reflects complete indifference to a known significant risk to such physical and emotional safety. Even with the required reasonable inferences in Class B plaintiffs' favor, nothing alleged in the Complaint here suggests such total indifference on

defendants' part. Class B plaintiffs cannot properly maintain a cause of action under the Due Process Clause.

Conclusion

Defendants' motion to dismiss is granted only as to plaintiffs' due process claim. It is denied in all other respects. That leaves open the substantive issues posed by plaintiffs' Motion for Preliminary Injunction and the extended Hearing. Because those issues may be impacted importantly by the current status of DCFS' restructuring plan described during the Hearing:

1. On or before November 30, 1989, defendants are ordered to file and to serve on plaintiffs' counsel a written report on that current status.

2. This case is set for a status hearing at 9 a.m. December 7, 1989 to treat with any questions that report may have left unanswered.

Milton I. Shadur
United States District Judge

Date: November 21, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARTIST M., *et al.*,
Plaintiffs,
v.
GORDON JOHNSON, *et al.*,
Defendants.

No. 88 C 10503

PRELIMINARY INJUNCTION

On December 14, 1988 Artist M., Sarah B., Claude F., Algienan G., Myron C., Willie M., Brandon W. and Amber B. filed a Complaint on behalf of themselves and the class of all children (collectively the "plaintiffs") who are or will be placed in the custody or under the supervision of the Illinois Department of Children and Family Services ("DCFS") in the course of an abuse, neglect or dependency proceeding in the Juvenile Division of the Circuit Court of Cook County, Illinois ("Juvenile Court"). Plaintiffs challenge defendants' policy and practice of failing to assign caseworkers to them in a timely manner. Plaintiffs assert that these policies and practices violate their rights under the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. ¶¶ 620-629, 670-679a ("AAA").[1] More specifically, plaintiffs assert that because of DCFS' caseworker assignment system, defendants fail to make reasonable efforts to preserve families when children are at risk of removal; to make reasonable efforts to facilitate reunification of families whose children have been removed; to develop case plans and a case review system for each child in foster care; and to monitor plaintiffs' foster homes so as to learn

[1] Originally plaintiffs also alleged that defendants' policies and practices violate the Due Process Clause of the Fourteenth Amendment. However, that count was dismissed by this Court on November 21, 1989. Plaintiffs' AAA claims remain intact.

of any additional abuse or neglect. In plaintiffs' view, defendants' caseworker assignment system violates each of these requirements.

At the time of filing their Complaint, plaintiffs also filed motions for a preliminary injunction and for class certification, each supported by a memorandum of law. Defendants responded by filing a memorandum in opposition to plaintiffs' motion for preliminary injunction on January 13, 1989.[2] On January 17, 18 and 19 this Court held an evidentiary hearing (the "Hearing"), admitting into evidence testimony and exhibits regarding defendants' caseworker assignment system and its application to the cases of specific plaintiffs. Following the submission by the parties of their proposed findings of fact and conclusions of law, this Court held in abeyance its decision on plaintiffs' motion for preliminary injunction until after consideration of the Supreme Court's decision in *Will v. Michigan Dept. of State Police,* 109 S. Ct. 2304 (1989), defendants' motion to dismiss, and defendants' attempts to restructure their caseworker assignment system.

At present, plaintiffs seek to enjoin, during the pendency of this action, defendants' policy and practice of failing to provide a caseworker to each of the plaintiffs and their families within 24 hours after the Juvenile Court places them in DCFS' temporary custody or returns them home under DCFS' supervision. Plaintiffs also seek to enjoin defendants' policy and practice of failing to provide a caseworker to them at all subsequent times while their cases are pending in Juvenile Court. This Court has given full consideration to the evidence submitted at the Hearing, reports tendered to it regarding the current status of defendants' caseworker assignment system, the arguments of counsel and the

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[2] With the agreement of defendants' counsel, on December 16, 1988 this Court granted plaintiffs' motion for class certification pursuant to Fed. R. Civ. P. ("Rule") 23(c)(1), both as to Class A (all plaintiffs) and as to Class B (the subclass of children who are or will be placed in DCFS' custody).

relevant authorities. In accordance with Rules 52(a) and 65(d) it is hereby ordered, adjudged, and decreed:

1. This Court has subject matter jurisdiction of this action under 28 U.S.C. §§ 1331 and 1343.

2. This Court's exercise of its discretion in reviewing the request for preliminary relief is guided by the five factors identified in *Roland Machinery Corp. v. Dresser Industries, Inc.*, 749 F.2d 380 (7th Cir. 1984). This Court finds that current issuance of a preliminary injunction is necessary and appropriate because;

a. *Plaintiffs have no adequate remedy at law. Roland Machinery, id.* at 386 establishes that plaintiffs have no adequate remedy at law if damages will be seriously deficient as a remedy for the harms suffered. Here plaintiffs ultimately seek declaratory and injunctive relief rather than damages. This Court holds that damages would not provide an adequate remedy for the violation of plaintiffs' rights under AAA in this case.

b. *Plaintiffs will suffer irreparable harm if a preliminary injunction is not issued.* This Court finds that the deprivation of plaintiffs' rights under AAA to reasonable efforts, case plans, case reviews and monitoring of their foster placements constitutes irreparable harm. By failing to assign and replace caseworkers promptly, DCFS increases the likelihood that families will be broken up or remain apart. Unnecessary loss of a familial relationship is an injury that cannot be repaired or made whole. In addition, defendants' failure to assign and replace caseworkers in a timely fashion deprives plaintiffs of services that appropriate case plans and case reviews would provide, leaves them in unnecessarily restrictive or dangerous placements, denies them essential visits with their parents and places them at risk of further injury. These, too, are irreparable harms.

c. *Plaintiffs have demonstrated a reasonable likelihood of success on the merits.* Plaintiffs have exceeded the threshold established in *Roland Machinery, id.* at 387 regarding the likelihood of their success on the merits

of their Complaint. As this Court stated in its November 21, 1989 memorandum opinion and order (the "Opinion"), plaintiffs may enforce their rights under AAA either through an implied cause of action or through 42 U.S.C. § 1983 (Opinion at 4-16). These enforcement mechanisms are available both to plaintiffs in DCFS' custody and to plaintiffs residing with their parent(s) or guardian under DCFS' supervision (Opinion at 8-12). Upon review of the evidence presented at the Hearing and the submissions of the parties regarding DCFS' restructuring of their caseworker assignment system, this Court finds that plaintiffs have clearly established more than a reasonable likelihood of success on the merits of their claims under AAA. Plaintiffs have demonstrated that the deficiencies in defendants' caseworker assignment system regularly cause children in their care and under their supervision to be deprived of the services of caseworkers for significant periods of time. Without a caseworker, defendants cannot put into place the services and protections to which plaintiffs are entitled under AAA. Defendants' efforts to restructure their caseworker assignment system during more than a year since the Hearing have failed to eliminate those systemic deficiencies from their system, or even to minimize the effects of those systemic deficiencies. In terms of 42 U.S.C. § 671(a)(15), plaintiffs have demonstrated more than a reasonable likelihood of success on the merits of their claim that defendants' failures during the period since the Hearing show they have not exercised the "reasonable efforts" called for by that statute.

d. *Balancing of harms favors the plaintiffs.* While plaintiffs will suffer immediate and irreparable harm this Court does not issue a preliminary injunction, defendants have not asserted any interest that is sufficiently compelling to require that their current caseworker assignment system remain intact. Defendants themselves have suggested that assigning caseworkers within three days of the time that a temporary custody case is first heard in Juvenile Court would not be overly burdensome (Defendants' August 4, 1989 Supplemental

Submission at 29). Additionally, defendants have indicated to this Court that they are capable of assigning a caseworker before the case is first heard in Juvenile Court when children are to be returned home under court supervision (Defendants' November 30, 1989 Supplemental Report at 2). Finally, defendants have offered no justification—compelling or otherwise—for failing to assign a caseworker promptly after the previously assigned caseworker relinquishes responsibility for a case. Consequently, this Court finds that the potential harm to plaintiffs if a preliminary injunction is denied by far outweighs any potential harm that defendants may suffer by the grant of a preliminary injunction.

e. *Issuance of a preliminary injunction will not disserve the public interest.* When emergency relief will cause defendants to follow congressional mandates, the public interest is always served (*Children's Memorial Hospital v. Illinois Department of Public Aid*, 562 F. Supp. 165, 174 (N.D. Ill. 1983)). Any court order that requires defendants to ensure that a caseworker is capable of delivering appropriate child welfare services to the plaintiffs and their families, in compliance with AAA, clearly serves the public interest.

3. Plaintiffs' motion for a preliminary injunction is therefore granted. Based on the evidence and reports presented to it, however, this Court will modify the relief requested by plaintiffs. This Court finds that an injunction requiring defendants to assign a caseworker within three working days realistically reflects the institutional capabilities of DCFS. This Court will similarly require that defendants assign a caseworker within three days of the time that a previously assigned caseworker relinquishes responsibility for a case. Finally, to ensure that defendants fully comply with AAA, this Court will also prohibit them from assigning or transferring any case to any caseworker who, because of an excessive caseload, is incapable of delivering the services to which plaintiffs are entitled under AAA.[3]

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[3] In that respect, plaintiffs have proposed a 40-family caseload limit on caseworkers. Defendants point out accurately that the Hearing did not

(Footnote continued on following page)

4. Accordingly, Gordon Johnson, Gary T. Morgan and their officers, agents, servants, employees and attorneys, and all persons in active concert or participation with any of the foregoing who receive actual notice of this order by personal service or otherwise, are hereby enjoined from:

(a) failing to assign a caseworker capable of providing child welfare services to each of the plaintiffs and their families within three working days of the time that plaintiffs cases are first heard in Juvenile Court; and

(b) failing to assign a caseworker capable of delivering child welfare services within three working days of the time that a previously assigned caseworker relinquishes responsibility for any portion of a case. These provisions shall take effect May 31, 1990.

Milton I. Shadur
United States District Court Judge

DATED: March 2, 1990

(Footnote continued from previous page)
deal with that subject in evidentiary terms. Accordingly, this order speaks in terms of "a caseworker capable of providing child welfare services" without imposing a specific ceiling. But defendants are duty-bound to comply with that requirement, not to make assignments on paper that are not effective in practice.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARTIST M., *et al.*,
Plaintiffs,

v.

GORDON JOHNSON, *et al.*,
Defendants.

No. 88 C 10503

ORDER

On March 2, 1990 this Court entered a preliminary injunction ("Preliminary Injunction") enjoining defendants from (*id.* at 8-9):

> (a) failing to assign a caseworker capable of providing child welfare services to each of the plaintiffs and their families within three working days of the time plaintiffs' cases are first heard in Juvenile Court; and
>
> (b) failing to assign a caseworker capable of delivering child welfare services within three working days of the time that a previously assigned caseworker relinquishes responsibility for any portion of a case.

Those provisions are to take effect May 31, 1990 (*id.* at 9). Plaintiffs have requested that this Court order defendants to provide a mechanism by which their compliance with the Preliminary Injunction can be assessed (Motion for Amendment and Execution of Preliminary Injunction Order, filed Feb. 28, 1990). Defendants have objected to plaintiffs' request (Defendants' Response in Opposition to Plaintiffs' Motion for Amendment and Execution of Preliminary Injunction Order, filed March 1, 1990). This Court has given full consideration to the evidence submitted at the preliminary injunction hearing in January 1989, the reports tendered by the parties as to the current status of defendants' caseworker

assignment system, the arguments of counsel and the relevant authorities. It is hereby ordered that:

1. Every Friday from and after June 15, 1990 defendants shall provide the Office of the Public Guardian (counsel for plaintiffs in this action) with a list of (a) all members of Class A whose cases in the Circuit Court of Cook County, County Department, Juvenile Division ("Juvenile Court") were commenced during the week ending the previous Friday and (b) all members of Class A who are subjects of previously-initiated Juvenile Court cases and for whom the previously-assigned caseworker relinquished or was relieved of responsibility during the week ending the previous Friday and (c) all members of Class A who are subjects of previously-initiated Juvenile Court cases and for whom the previously-assigned caseworker relinquished or was relieved of responsibility at any time up to and including the previous Friday and for whom a new caseworker assignment was made during the week ending the previous Friday.

2. For each child identified in a list referred to in Paragraph 1, defendants shall include in such list (a) the name of the previously assigned caseworker (if any) and the date his or her prior assignment ended and (b) the name and telephone number of the newly assigned caseworker (if any) and the date of his or her assignment.

Milton I. Shadur
United States District Judge

Date: April 3, 1990